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United States of America

In the Supreme Court of the United States

October Term 1943

No. 474

MARTIN B. ROBINSON,

Petitioner,

v.

STATE OF MICHIGAN.

Respondent's Brief Opposing Petition for Writ of Certiorari to the Supreme Court of the State of Michigan.

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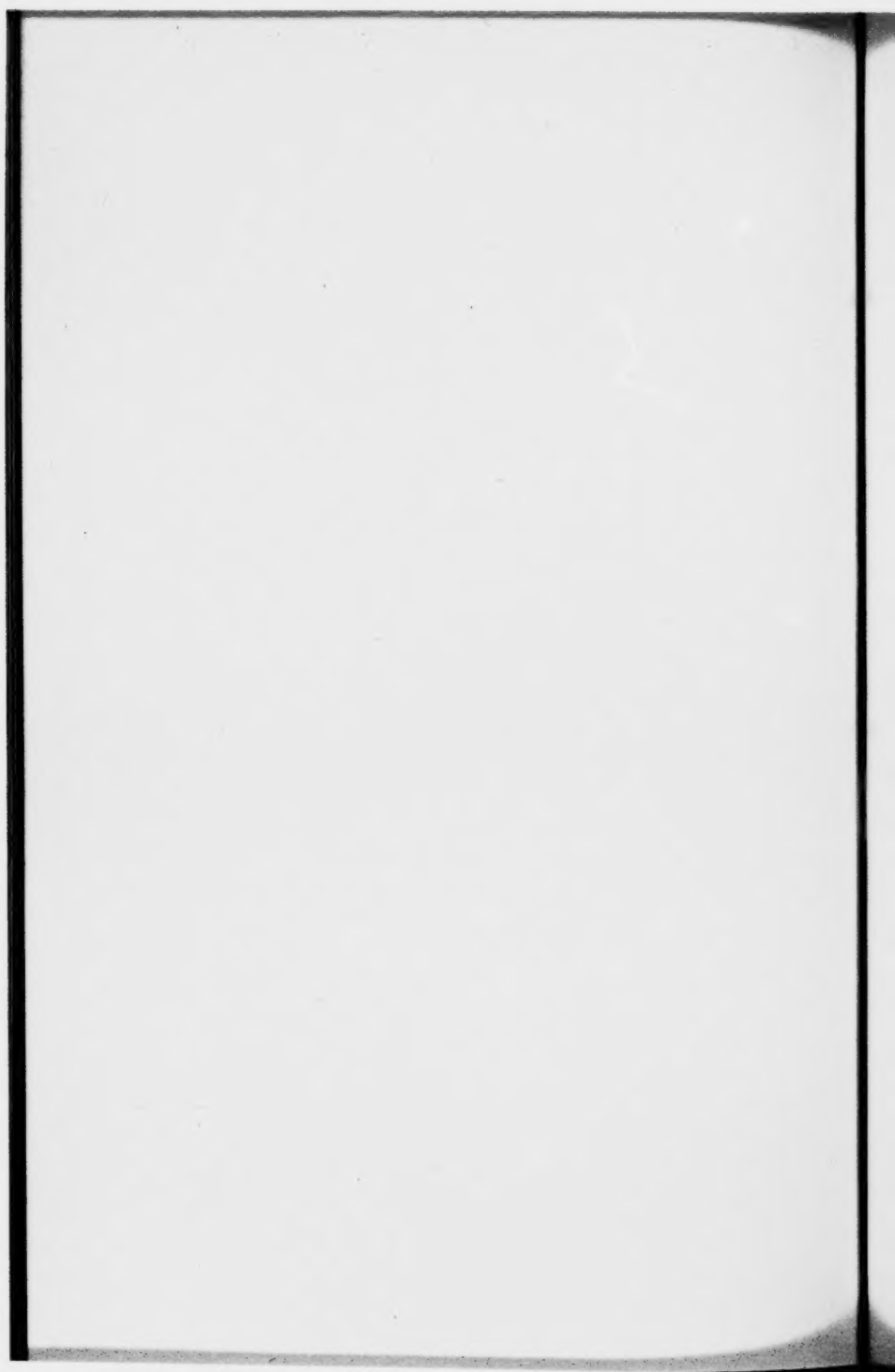


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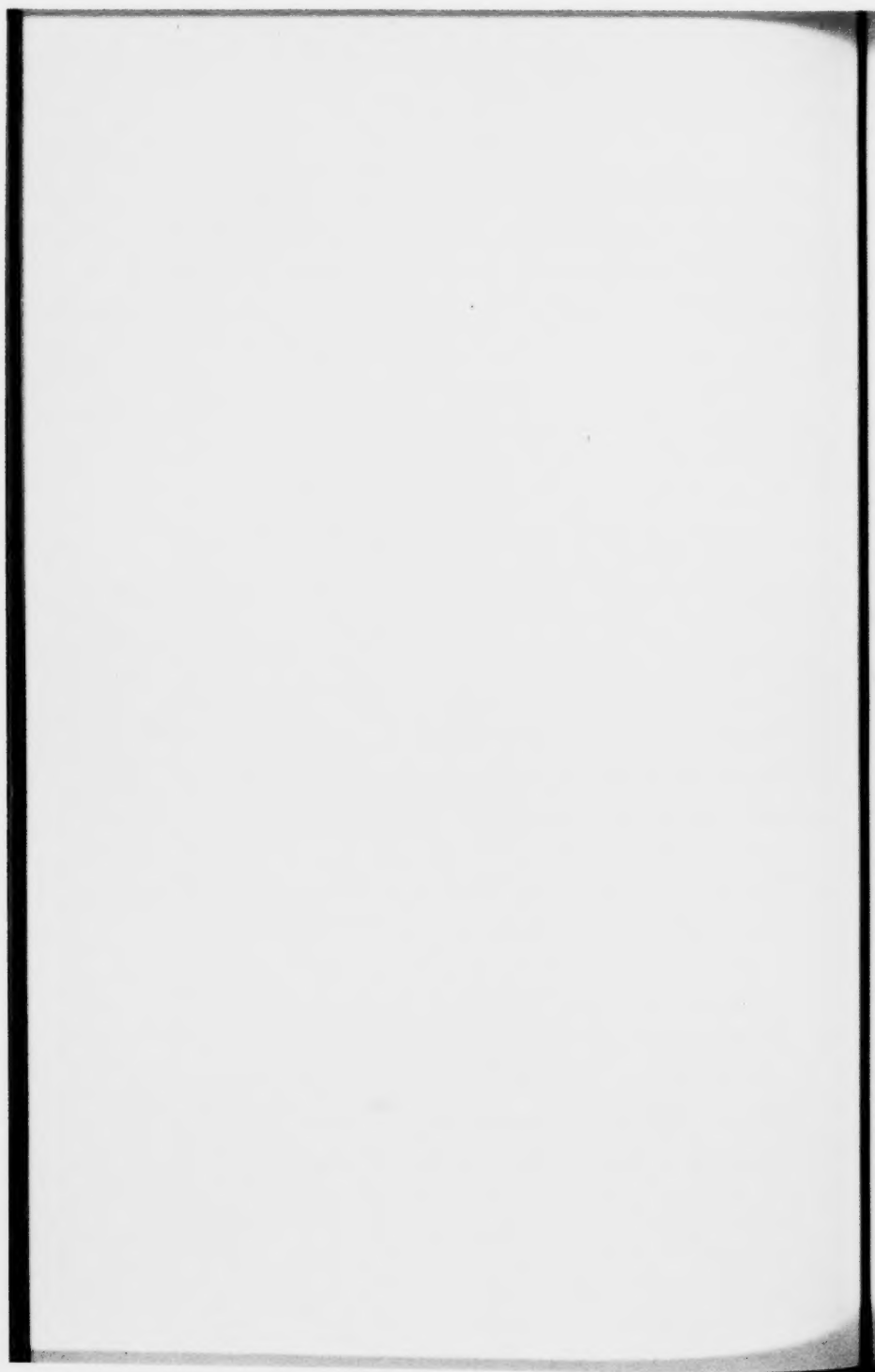
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Respondent's Brief Opposing Petition for Certiorari.[1]

I

Opinion Below.

Counsel have supplied the correct citation to the official report of the opinion of the Supreme Court of the State of Michigan.

[1]

Unless otherwise plainly indicated, numbers in parentheses throughout this brief refer to pages of the printed record.

II

Question Presented.

As stated by counsel, the question presented is

“whether the criminal conviction of the petitioner in the State court, following a ‘compulsory confession’ which he made before a grand jury, after having been held incommunicado for four days, and the subsequent use of such confession in the trial court, violated the petitioner’s rights under the due process clause of the Fourteenth Amendment to the Constitution of the United States”. (Petition, p. 2).

Since petitioner made no ‘*confession*’ in the sense understood by this Court in holding that

“convictions . . . which rest solely upon confessions shown to have been extorted by officers of the State by torture of the accused, are void under the due process clause of the Fourteenth Amendment”,^[2]

since no ‘confession’ was introduced in evidence as proof of petitioner’s guilt, since his conviction was based upon other competent testimony, since his former testimony, used only to refresh his recollection and to test his credibility as a witness in his own behalf (235-240), was not taken before a traditional ‘grand jury’ empowered to indict him, but was taken by a judicial officer engaged

[2]

Brown v. Mississippi, 297 U. S. 278.

in an investigation of suspected offenses committed within his jurisdiction,^[3] and since neither the information (8) later filed by the attorney general, nor the conviction which followed a trial by jury (xi), rested solely upon a 'confession', the former being based upon the findings of a judge of the recorder's court of the city of Detroit, sitting as an examining magistrate, the latter being founded upon competent testimony of other witnesses, it becomes perfectly clear that the premises of the 'Question Presented' are faulty.

III

Basis of Jurisdiction.

The Federal constitutional question now for the first time presented for consideration by any court, was not raised during any of the proceedings in the recorder's court of the city of Detroit:

The first opportunity for presentation of such a question was afforded petitioner when, after a warrant for his arrest had been issued, he was arraigned thereon before an examining magistrate (ix).

[3]

Although the Michigan Code of Criminal Procedure authorizes such a judicial investigation, the magistrate possesses no power to indict, the tribunal thus created is not a 'grand jury' (the term 'one-man' grand jury being merely a popular designation), and the issuance of a warrant is followed by a preliminary examination and further due process to bring an accused person to trial (Act No. 175, Chapters VI and VII [3 Comp. Laws 1929 §§ 17193-17197, 17203-17207, 17215-17233 (Stat. Ann. §§ 28.919-28.923, 28.929-29.933)]).

But he did not raise the question on motion to dismiss the warrant of arrest (ix), nor did he raise it during the preliminary examination (the record does not contain a transcript of such proceedings).

And he did not assert any constitutional rights under the due process clause of the Fourteenth Amendment, during the trial:

1st. The question was not raised by petitioner in his motion for a separate trial (15), nor was it presented in his several motions to quash the information (25, 30).

2nd. It was not stated as a ground for direction of verdict in petitioner's motion made at the close of the State's case (181).

3rd. When petitioner voluntarily testified as a witness in his own behalf (181-190), he failed to state that a 'confession' had been extorted from him by officers of the State, and his counsel made no motion for mistrial on that ground.

4th. When recalled to the stand for further cross-examination (234), and asked if he recalled certain testimony given by him before the 'grand jury', so-called, petitioner's counsel interposed no objection to the reading of such testimony to petitioner on the ground that rights guaranteed to him by the Fourteenth Amendment had been violated, or that he had been denied any other constitutional rights (234-240), and testimony concerning events which transpired in the ante-room of the 'grand jury' were elicited by his own counsel on re-direct examination (240-247), in explanation of conced-

edly false testimony given by petitioner on that occasion, and in an effort to reestablish his credibility as a witness.[4]

And we note that counsel failed to raise the question of infringement of petitioner's rights guaranteed by the Fourteenth Amendment,[5] by moving for a dismissal of the case on this ground, or by moving for a mistrial.

5th. Nor did counsel renew his motion for a directed verdict at the close of defendant's case, or at any time after petitioner had testified concerning his treatment in the 'grand jury' room.

6th. Although petitioner's counsel presented 'requests to charge', he did not include therein a request based upon his present claim of denial of constitutional rights (468-475).

7th. The Federal question was not raised in petitioner's motion for new trial (272) prepared by counsel who later represented him in the State Supreme Court, nor in the affidavits thereto attached (279-316).

8th. After the cause had been pending for some time on appeal in the Supreme Court, petitioner obtained a

[4]

It is noteworthy that, on re-cross examination (247-250), petitioner admitted that he, a member of a worthy profession, carried a gun in the grand jury room (248).

[5]

One may observe that a careful search of the entire record fails to disclose any mention of the Fourteenth Amendment to the Constitution of the United States.

remand of the record to the trial court (552) where he filed a supplemental motion for new trial (558), which was denied (583), but even in those proceedings counsel failed to present any Federal constitutional question.

The Federal constitutional question was not presented to the Supreme Court of the State of Michigan:

1. The Michigan Code of Criminal Procedure (Chapter X, § 4 [3 Comp. Laws 1929, § 17358 (Stat. Ann. § 28.1101)]) and Michigan Court Rule 60, require settlement of a concise statement of the case as the basis of an application for leave to appeal to the State Supreme Court from a conviction of crime.

Petitioner caused such a concise statement (492) to be settled by the trial court, and on that basis he filed with the Supreme Court of the State an application for leave to appeal (477-491), but in neither of these documents did he attempt to raise the Federal constitutional question.

2. Once leave to appeal has been granted, the code (Chapter X, § 11) requires settlement of a bill of exceptions, and Rule 66 requires that reasons and grounds of appeal shall accompany it, these being commonly designated 'assignments of error'.

But in his assignments of error (2-7), petitioner did not raise the Federal question.

3. In the petition on file in this Court, it is said that

"timely objection was made in the Supreme Court of Michigan to the use of the confession alleged to

have been given by the petitioner before the grand jury, under duress, on the ground that defendant's constitutional rights were violated. Objection was also made by the petitioner that his constitutional privilege against self-incrimination had been violated, and that an information against him based upon such testimony should not stand. The Supreme Court of Michigan held against the second and third of these contentions (R. 641) and ignored the first contention".

But the first contention was not raised in the court below.

And counsel, who are strangers to this record, are mistaken in several of the foregoing statements.

4. In his 'Statement of Questions Involved' (587), set forth in his brief in the State Supreme Court pursuant to Rule 67, § 1, counsel for petitioner (appellant below) raised the following question:

"II. Can a person compelled to testify before a 'One Man Grand Jury' in an investigation directed against himself be thereafter charged with any offenses which such investigation may have tended to disclose."

Under that heading (603), it was contended that

"a person who has, even voluntarily, testified before a grand jury, or some other inquisitorial body, cannot thereafter be charged with any crime based upon or connected with that investigation, for to so charge him would be compelling him to be a witness against

himself, contrary to the constitution. On the same principle, to examine him when he is about to be made a defendant is a violation of his constitutional right not to be a witness against himself”.

While numerous authorities were cited in petitioner’s brief (601-608), no decision of this Court was included.

And in the ‘Conclusion’ of his brief (635), petitioner’s counsel contended:

“The lower court should have granted appellant’s motion to quash, because

a. Judge Ferguson (the investigating magistrate) had no jurisdiction to inquire into the alleged crime and issue the warrant,

b. appellant, compelled to testify in an inquisition directed against himself, was thereby compelled to incriminate himself”.

Thus it plainly appears that petitioner’s counsel did not claim that the conviction rested solely upon a ‘confession’ extorted by officers of the State by torture of the accused, or that such a conviction was void under the due process clause of the Fourteenth Amendment.

Nor did the State Supreme Court, in their opinion (638-645), feel called upon to consider such a Federal constitutional question.

5. Nor was the Federal constitutional question raised in petitioner’s application for rehearing in the State Supreme Court (650-651).

Although, in such application (651), it was stated that

“the majority opinion is in error in holding that appellant testified voluntarily before the grand jury when the testimony was literally beaten out of him by outrageous physical violence”,

the court's opinion (641-642) contains no such statement.

Nor can it be said that the foregoing ground for rehearing raises the question whether petitioner's conviction rested solely on a 'confession' extorted from the accused, or that his rights under the due process clause of the Fourteenth Amendment had been violated.

Moreover, if we assume that such an allegation (651) is sufficient to raise the Federal constitutional question, such a claim came too late in an application for rehearing.^[6]

IV

Counter-Statement of Facts.

We are unable to accept counsel's 'Statement of Facts' (Petition, pp. 2 and 3), and we note the following errors:

[6]

Herndon v. Georgia, 295 U.S. 441.

In the case of *Herndon*, *supra*, this Court held that 'an attempt to raise a federal question before a state supreme court upon a petition for rehearing after judgment, is too late, unless that court actually entertains the question and decides it'.

1. It is said (p. 3):

“The information on which petitioner was tried was returned by Judge Homer Ferguson of Detroit, sitting as a one-man grand jury under the Michigan statute”.

Counsel misapprehend the course of procedure charted by the Michigan Code of Criminal Procedure (see footnote ‘3’, *ante*, p. 3).

Under the provisions of that code, a judicial officer who conducts an investigation of suspected offenses committed within his jurisdiction, may issue a warrant authorizing an arrest, but he is not empowered to return an information, or an indictment. When the warrant is issued, and an accused person is apprehended, the respondent is brought before a magistrate of competent jurisdiction (in this case a judge of the recorder’s court of the city of Detroit); a preliminary examination is held by the magistrate to determine whether an offense has been committed, and whether there is probable cause to believe that the accused has committed the offense; if probable cause is found by the magistrate, he makes his return to the trial court; whereupon the prosecuting attorney (or the attorney general) lays his information based upon the findings of the magistrate, and the accused is then privileged to file a motion to quash the information on any valid ground, including the contention that the proofs taken at the preliminary examination were insufficient to establish probable cause for holding the accused for trial.

For sake of convenience, we publish as appendixes (*post*, p. 32): ‘A’: an explanation of the Michigan

procedure established by our code; 'B': a copy of pertinent provisions of the code pertaining to preliminary examinations; and 'C': a copy of pertinent provisions thereof pertaining to investigations of suspected offenses (the one-man grand jury, so-called).

It therefore becomes manifest that Judge Ferguson, who acted in the capacity of an investigating judicial officer under the code of criminal procedure, did not return an information.

The information in this case (8) was filed in the trial court (the recorder's court of the city of Detroit), by the attorney general of the State, after a preliminary examination had been conducted by a judge of the recorder's court, sitting as a magistrate, and following a judicial finding of probable cause to hold petitioner for trial.

2. Counsel are also mistaken when they say:

"It (the information) was based upon testimony in the nature of a 'confession' given before the one-man grand jury by petitioner" (Petition, p. 3).

As a matter of fact and law, the information was based solely upon the return of the examining magistrate (not upon testimony taken by Judge Ferguson), and upon testimony taken by the magistrate in the course of a preliminary examination to determine probable cause.

3. It is also said that 'petitioner later stated that his *'confession'* was false and had been forced upon him by the above mentioned brutal and inhuman treatment (242)'.

That statement is quite unintentionally misleading, for in his testimony on re-direct examination (242) petitioner mentioned no '*confession*' given by him under compulsion or otherwise. He merely referred to certain testimony adduced from him before the investigating judicial officer, and he sought to reestablish his credibility as a witness by relating what occurred prior thereto.

4. And, finally, it is said:

"Portions of his testimony before the grand jury, however, were read to the trial jury at petitioner's trial in impeachment of testimony which he had previously given in his own behalf".

No portion of such testimony was introduced in evidence for the purpose of impeachment, since petitioner readily admitted its falsity (240); much less was it used by the State as a '*confession*' upon which to base conviction.

V

Reasons for Opposing the Allowance.

The reasons relied on for allowance of the writ possess no merit:

1. While this Court have indicated that they will review and set aside convictions in State courts, which are based on *confessions* secured by 'physical and mental torture and coercion', and where defendants 'have been unlawfully held incommunicado without advice of friends

or counsel',^[7] such a situation is not found in the case at bar, and the question now presented was not raised in the trial court or in the Supreme Court of the State of Michigan.^[8]

2. The record in this case does not call for reëxamination of the doctrine of *Twining v. New Jersey*, 211 U. S. 78, and the 'current of opinion' referred to by this Court in *Chambers v. Florida*, 309 U. S. 227, 235, does not justify a holding that the Fourteenth Amendment was intended to make secure against State invasion the constitutional inhibition against compulsory self-incrimination which is protected from Federal violation by the Fifth Amendment.^[9]

3. The information in this case was not based upon evidence obtained from the petitioner after he had been in custody of the arresting officers for four days, and before any order of commitment was made, nor was conviction had upon evidence obtained in disregard of liberties deemed fundamental by the Constitution. There is, therefore, no occasion to consider and resolve 'the

[7]

Chambers v. Florida, 309 U. S. 227,
Ward v. Texas, 316 U. S. 547.

[8]

Herndon v. Georgia, 295 U. S. 441.

[9]

As recently as 1937, this Court adhered to the rule that 'the Fourteenth Amendment does not guarantee against state action all that would be a violation of the original bill of rights (Amendments I to VIII) if done by the Federal Government', including, it was said, immunity from compulsory self-incrimination.

Palko v. Connecticut, 302 U. S. 319, 325.

constitutional issue raised but not decided in *McNabb v. United States*, 318 U. S. 332'. Indeed, it may be said that the decision in the case of *McNabb, supra*, recognizes limitations upon the power of this Court 'to undo convictions in State courts' (p. 340).

VI

Argument

Point One

Since the Federal constitutional question presented in the petition for certiorari, was not raised in the trial court, or in the Supreme Court of the State of Michigan, there is no basis of jurisdiction.

Since the sovereign State of Michigan stands indicted in this Court upon the grave charge of denying due process to one accused of crime, it is important to determine whether the question was timely raised in the trial court or in the reviewing court below, for under the repeated decisions of this Court, one who levels such a serious accusation is still required first to exhaust his remedies in the courts of the State; otherwise, state sovereignty would disappear.

It should be observed, in the first place, that the petitioner, who, according to his own testimony (182), is a registered pharmacist as well as a doctor of medicine, holding degrees from the University of Michigan, is a man of more than average intelligence, and he is not a member of any oppressed minority group.

None of the acts of which he complains (being held incommunicado, and the physical beatings) occurred in the presence of the judge who conducted the investigation (the 'one-man grand jury', so-called), but they took place in the ante-room of the 'grand jury', and they were perpetrated by minor police officers.

Furthermore, from the time of his arrest to the moment of his conviction, and throughout the proceedings on appeal to the State Supreme Court, petitioner was represented by competent counsel of high standing at the bar.

If a 'confession' had been extorted from him by State officials in charge of the 'grand jury' (so misnamed), he was fully cognizant of that fact, and it was his duty, and the duty of his counsel, to bring it to the attention of the court as speedily as possible.

If, as he now claims, his fundamental rights had been disregarded, he could readily have asserted them on the first possible occasion, when he was arrested on a warrant and brought before the examining magistrate.

And, if such a state of facts existed, it is only reasonable to suppose that the situation would have been brought to judicial attention the moment he was placed in jeopardy.

But he did not raise the question by moving to suppress the warrant (the record discloses no such motion), and the record is silent on the proceedings had below on preliminary examination.

In our statement concerning the 'Basis of Jurisdiction', we have clearly established the fact that at no point in the trial did he raise any Federal constitutional question, and we need not repeat in detail what we said under that subdivision of the brief.

Nor was the question timely raised in the Supreme Court of the State of Michigan (see, *ante*, p. 6).

But, it is urged, the question was raised on application for rehearing.

That is not precisely true, for while counsel, in his application for rehearing, undertook to criticize the opinion of the court below, in that it was 'in error in holding that appellant testified voluntarily before the grand jury when the testimony was literally beaten out of him by outrageous physical violence' (651), he did not claim that petitioner's conviction was based solely upon a 'confession' extorted from him by such means, thereby violating the due process clause of the Fourteenth Amendment, nor was he in a position to do so.

If the language of the 3rd ground of petitioner's application for rehearing (651), can be distorted into a claim of constitutional violation, such a contention came much too late.

This Court, in *Herndon v. Georgia, supra*, (295 U.S. 441), has clearly laid down for the guidance of counsel the rules applicable to such a situation.

The third, fourth and fifth syllabi of that opinion read as follows:

"3. An attempt to raise a federal question before a state supreme court upon a petition for rehearing after judgment, is too late, unless that court actually entertains the question and decided it.

4. But a federal question first presented to the state court by petition for rehearing is in time if it could not have been raised earlier because the ruling

of that court to which it is directed could not have been anticipated.

5. A ruling is not to be regarded as unanticipated by the party where it is one that follows an earlier decision of the same court in a similar case”.

Clearly, in the case at bar, the Federal constitutional question could have been raised earlier; indeed, it could have been raised, and should have been raised in the trial court which, after all, is better equipped to inquire into the facts surrounding an alleged compulsory ‘confession’.

The ruling in *Herndon v. Georgia*, *supra*, has been followed most religiously by this Court in denying numerous applications for certiorari, and in dismissing appeals.^[10]

And in *White v. Texas*, 310 U.S. 530, 531, the Court clearly indicate the proper course to be followed by counsel in raising such a constitutional question:

“From the first offer of the alleged confession in evidence at the trial, petitioner has challenged the State’s right to utilize it, consistently with rights guaranteed him by the Federal Constitution. In af-

[10]

Postal Telegraph-Cable Co. v. White, 296 U.S. 534,
Jones v. Louisiana, 299 U.S. 511,
Coleman v. City of Griffin, 302 U.S. 636,
Whitmer v. Illinois, 305 U.S. 576,
W. T. Carter & Bros. v. Short, 308 U.S. 513,
Saenger Realty Corporation v. Grosjean, 310 U.S. 613,
Southwestern Bell Telephone Co. v. Lee, 311 U.S. 609,
Eagles et al. v. General Electric Co., 312 U.S. 658.

firming the conviction and sentence of death, the court below necessarily determined that use of the confession did not constitute a denial of that due process which the Fourteenth Amendment guarantees”.

Certainly, in the case at bar, such a course was not pursued by any counsel representing the petitioner.

We, therefore, respectfully submit there is no ‘basis of jurisdiction’ to entertain the ‘Question Presented’ in the petition for certiorari.

Point Two

There is no substance to the claim that conviction of petitioner was based on a ‘confession’ extorted from the accused by state officers by torture or other means in violation of due process of law guaranteed by the Fourteenth Amendment.

Recent decisions of this Court, upon which petitioner relies,

Brown v. Mississippi, 297 U.S. 278,
Chambers v. Florida, 309 U.S. 227,
Ward v. Texas, 316 U.S. 547,

considered in view of the general principles also pronounced in

Buchalter v. New York, 319 U.S. 427,

have no application to the situation presented at bar.

It is first noted that in each of those cases, conviction rested solely on the compulsory confession.

In *Brown v. Mississippi, supra*,

“aside from the confessions, there was no evidence sufficient to warrant the submission of the case to the jury. After a preliminary inquiry, testimony as to the confessions was received over the objection of defendants’ counsel”.

And the Court say:

“It would be difficult to conceive of methods more revolting to the sense of justice than those taken to procure the confessions of these petitioners, and the use of the confessions thus obtained *as the basis of conviction and sentence* was a clear denial of due process”.

In the case of *Chambers, supra*, the Court observed:

“When Chambers was tried, *his conviction rested upon his confession and testimony of the other three confessors*”,

who, like him, had been subjected to brutal treatment.

Moreover, the Court say:

“Since petitioners have seasonably asserted the right under the Federal Constitution to have their guilt or innocence of a capital crime determined *without reliance upon confessions* obtained by means proscribed by the due process clause of the Four-

teenth Amendment, we must determine independently whether petitioners' confessions were so obtained, by review of the facts upon which that issue necessarily turns".

And in *Ward v. Texas*, *supra*, the Court say:

"p. 549) The Court of Criminal Appeals in its final opinion denying petitioner's motion for rehearing concluded 'It may be stated bluntly that no conviction could be sustained in the present case without the confession of appellant' "

In the case at bar, conviction did not rest upon such a 'confession'.

The Supreme Court of the State of Michigan found (642) there was sufficient evidence against petitioner at the close of the people's case to deny his motion for directed verdict and submit the matter to the jury.^[11]

No 'confession' was introduced in evidence at any time throughout the trial, much less before the court denied a directed verdict, and petitioner's prior testimony taken by the investigating judicial officer was never used as proof of guilt.

[11]

The court say (642):

"The record is replete with testimony from which the legitimate inference may be drawn that Robinson was interested in preventing the prosecution of the alleged holdup men for the purpose of covering up his own gambling connections. Conspiracy may be established by circumstances and may be based on inferences. There was evidence to submit to the jury as to Robinson's connection with the conspiracy".

It cannot be said that petitioner's conviction rested solely upon a 'compulsory confession'.

Although possibly not controlling, it is highly significant that in all of the cases decided by this Court, and cited by the petitioner, the accused persons were members of oppressed minorities.

As Mr. Justice Black expressed it (in the case of *Chambers, supra*, p. 238):

"The rack, the thumbcrew, the wheel, solitary confinement, protracted questioning and cross-questioning, and other ingenious forms of entrapment of the helpless or unpopular had left their wake of mutilated bodies and shattered minds along the way to the cross, the guillotine, the stake and the hangman's noose. And they who have suffered most have always been the poor, the ignorant, the numerically weak, the friendless, and the powerless".

Certainly it cannot be said that petitioner came within any of these categories, for he was a man of more than ordinary intelligence, and a member of a learned profession.

We respectfully submit that, since no 'confession' so obtained was used as the sole basis of conviction, there is no substance in petitioner's claim that he has been denied due process.

Point Three

The question whether any rights or privileges guaranteed petitioner by the due process clause of the Fourteenth Amendment, construed to embrace the self-incrimination clause of the Fifth Amendment, were infringed by compelling him to testify before the 'grand jury', so-called, was not properly raised in the court below, comes as an afterthought, and the contention lacks substance.

It is said that this Court should now reëxamine the doctrine of *Twining v. New Jersey*, 211 U. S. 78, and hold that the Fourteenth Amendment was intended to make secure against state invasion the constitutional inhibition against compulsory self-incrimination which is protected from Federal violation by the Fifth Amendment.

"Such a course (say counsel) is justified by the 'current of opinion' referred to by this Court in *Chambers v. Florida*" (309 U. S. 227, 235).

First: The practice of combing a record in search of a Federal question not specifically raised in the court below, is grossly unfair to the highest court of the State, attempts to deprive it of sovereign powers, and has never been tolerated by this Court (*Herndon v. Georgia, supra*).

In appellant's brief filed in the Michigan Supreme Court (601-608), it was contended that 'Appellant, compelled to testify before "one man grand jury", could not thereafter be charged in connection with matters disclosed' (601).

Counsel said:

“It is the contention of appellant that a person who has, *even voluntarily*, testified before a grand jury, or some other inquisitorial body, cannot thereafter be charged with any crime based upon or connected with that investigation, for to so charge him would be compelling him to be a witness against himself, contrary to the constitution. On the same principle, to examine him when he is about to be made a defendant is a violation of his constitutional right not to be a witness against himself” (602-603).

The foregoing statement, we respectfully submit in view of the cases cited in the brief (603-608), merely raised a local question; the constitutional rights asserted are those guaranteed by the State Constitution (article 2, § 16), and petitioner’s counsel did not invoke the Fifth or Fourteenth Amendments to the Constitution of the United States, nor did they cite any decision of this Court.

And the Supreme Court of the State of Michigan considered (641) the question controlled by their own decisions (*People v. Smith*, 257 Mich. 319, *People ex rel. Roach v. Carter*, 297 Mich. 577), and by the code of criminal procedure (Act No. 175), Pub. Acts 1927 [3 Comp. Laws 1929, § 17215 *et seq.* (Stat. Ann. § 28.941 *et seq.*)).

Obviously, then, petitioner’s present contention is an afterthought.

Second: While Mr. Justice Black, when writing for the Court in the case of *Chambers, supra*, observed (p.

235) a 'current of opinion . . . that the Fourteenth Amendment was intended to make secure against state invasion all the rights, privileges and immunities protected from Federal violation by the Bill of Rights', he evinced no judicial intent to abandon the established doctrine that the right to immunity from self-incrimination is not so fundamental as to require its inclusion in the conception of due process of law (*Twining v. New Jersey*, 211 U. S. 78), and the decision in *Chambers v. Florida* rests squarely on the rule that convictions which are founded solely upon confessions extorted by state officers by torture of an accused, whether physical or mental, cannot stand.

The case of *Twining* was followed in

Ensign v. Pennsylvania, 227 U. S. 592,

holding that the Fifth Amendment—which provides (*inter alia*) that 'no person . . . shall be compelled in any criminal case to be a witness against himself'—is not obligatory upon the States or their judicial establishments, and that a violation of defendant's rights under a provision in the state constitution which is identical to one in the Federal Constitution which is only obligatory on the Federal courts, does not infringe a Federal right.^[12]

Recent decisions of this Court bearing directly or indirectly upon the immunity here in question, adhere to

[12]

As recently said by Mr. Justice Roberts: ' . . the Amendment does not draw to itself the provisions of the state constitutions'. *Buchalter v. New York*, 319 U. S. 427.

the general principle announced as controlling in the case of *Twining*:

Snyder v. Massachusetts, 291 U. S. 97, 105.

Brown v. Mississippi, 297 U. S. 278,

Palko v. Connecticut, 302 U. S. 319.

In *Snyder v. Massachusetts*, *supra*, the Court, speaking through Mr. Justice Cardozo, say:

“The Commonwealth of Massachusetts is free to regulate the procedure of its courts in accordance with its own conception of policy and fairness unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental. . . The privilege against self-incrimination may be withdrawn and the accused put upon the stand as a witness for the State”.^[13]

[13]

It may be noted at this point that the legislature of the State of Michigan, in enacting the Code of Criminal Procedure to provide for judicial investigations of suspected criminal offenses (the ‘one-man grand jury’, so-called), did not withdraw the privilege against self-incrimination in such proceedings, but provided:

“Sec. 6. No person shall upon such inquiry be required to answer any questions the answers of which might tend to incriminate him except upon motion in writing by the prosecuting attorney which shall be granted by such justice or judge, and no person required to answer such questions upon such motion shall thereafter be prosecuted for any offense concerning which such answers may have tended to incriminate him”.

Act No. 175, Chapter 7, § 6, Pub. Acts 1927 (3 Comp. Laws 1929, § 17220 [Stat. Ann. § 28.946]).

In *Brown v. Mississippi*, *supra*, where the Court holds that convictions which rest solely upon extorted confessions, are void under the due process clause of the Fourteenth Amendment, the State stressed the statement in *Twining v. New Jersey*, that 'exemption from compulsory self-incriminating in the courts of the States is not secured by any part of the Federal Constitution', and the statement in *Snyder v. Massachusetts*, that 'the privilege against self-incrimination may be withdrawn and the accused put upon the stand as a witness for the State'.

"But (said Mr. Chief Justice Hughes, speaking for the Court) the question of the right of the State to withdraw the privilege against self-incrimination is not here involved. The compulsion to which the quoted statements refer is that of the processes of justice by which the accused may be called as a witness and required to testify. *Compulsion by torture to extort a confession is a different matter.* [Emphasis supplied].

The State is free to regulate the procedure of its courts in accordance with its own conceptions of policy, unless in so doing it 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental'. *Snyder v. Massachusetts*, *supra*; *Rogers v. Peck*, 199 U. S. 425, 434. . . . But the freedom of the State in establishing its policy is the freedom of constitutional government and is limited by the requirement of due process of law. Because a State may dispense with a jury trial, it does not follow that it may substitute *trial by ordeal*. The rack and torture chamber may not be substituted for the witness stand. . . . *And the trial equally is a mere pretense where the*

state authorities have contrived a conviction resting solely upon confessions obtained by violence". [Emphasis supplied].

Mr. Justice Cardozo, speaking for the Court in the case of *Palko v. Connecticut*, *supra*, said:

"What is true of jury trials and indictments is true also, as the cases show, of the immunity from compulsory self-incrimination. . . . This right might be lost, and justice still be done. Indeed, today as in the past there are students of our penal system who look upon the immunity as a mischief rather than a benefit, and who would limit its scope, or destroy it altogether. No doubt there would remain the need to give protection against torture, physical or mental. *Brown v. Mississippi*, *supra*. Justice, however, would not perish if the accused were subject to a duty to respond to orderly inquiry".

And in *Chambers v. Florida*, 309 U. S. 227, the Court refers to 'the right under the Federal Constitution to have . . . guilt or innocence of a . . . crime determined *without reliance upon confessions obtained by means proscribed by the due process clause of the Fourteenth Amendment*'. [Emphasis supplied].

Manifestly, then, this Court has drawn a clear line of demarcation between rights asserted under the 'self-incrimination clause' of Federal and State Constitutions, and rights asserted under the due process clause of the Fourteenth Amendment. Under those decisions it is established that a State's withdrawal of the guarantee against self-incrimination is not a denial of due process (*Twining v. New Jersey*; *Palko v. Connecticut*), but

where a conviction *rests solely upon a confession* illegally and wrongfully obtained through force and violence, it cannot be permitted to stand under the due process clause of the Fourteenth Amendment (*Brown v. Mississippi*; *Chambers v. Florida*; *Ward v. Texas*).

Indeed, it may truthfully be said that, in the latter instance, the accused has had no trial, but the question of his guilt or innocence has been determined by tyrants within the precincts of their torture chamber rather than in a court of competent jurisdiction. *Chambers v. Florida, supra*.

Such was not the situation in the case at bar.

Petitioner's conviction did not rest solely upon a confession extorted from him by torture, physical or mental; he was accorded the privilege of a preliminary examination to determine probable cause for holding him to trial; he was accorded a trial before a court of competent jurisdiction and a jury duly empaneled; the State established his guilt by means of competent testimony; the Supreme Court of the State of Michigan held that such evidence was sufficient to send the case to the jury; no confession was received in evidence; and the jury adjudged him guilty of the offense charged in the information.

We, therefore, respectfully submit there is no merit to his contention that he has been denied due process of law.

Point Four

There is no substance in the contention that the information in this case was based upon evidence wrongfully obtained.

This point has been covered (*ante*, pp. 10-11). Suffice it to say that the information in this case was based solely upon testimony adduced on preliminary examination, and the return of the examining magistrate finding probable cause. It did not rest upon testimony obtained by the judicial officer who investigated suspected criminal offenses, and who issued the warrant for petitioner's arrest.

VII

Conclusion.

For the reasons stated in this brief, it is respectfully submitted that the writ of certiorari should be denied.

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